Management Update

February 2009
Top Ten Legal Challenges Facing Employers in 2009

2009 promises to be a time of change for Americans and especially so for employers. In the upcoming year, employers are likely to feel the impact of many of the U.S. Supreme Court's employment-related decisions and much of the legislation that was enacted in 2008. Additionally, 2009 may bring more employment-related legislation (see the article Significant Legislative Items to Watch in 2009, in this issue of Management Update) and increased enforcement efforts by many federal regulatory agencies.

Some of the more significant challenges employers likely will face in 2009 include:

1. **Compliance with Revised FMLA Regulations:** Employers are now required to comply with the Department of Labor (DOL)'s significant revisions to the regulations interpreting the Family and Medical Leave Act (FMLA), including providing four different types of FMLA notice at various times during the leave process and complying with the DOL's new certification form requirements.
2. **Compliance with the Military Leave Act Amendment to the FMLA:** Employers are also now required to comply with the Military Leave Act Amendment to the FMLA. Among other things, this amendment provides that FMLA leave is available for "qualifying exigencies" arising from a family member's military deployment and gives qualified employees 26 weeks of military caregiver leave.
3. **Compliance with the Lilly Ledbetter Fair Pay Act:** This Act alters the deadline or statute of limitations for pay discrimination claims brought under various federal anti-discrimination laws. The Act is retroactive to May 28, 2007. (See *President Obama Signs Lilly Ledbetter Fair Pay Act*, in this issue of *Management Update*).
4. **Compliance with the Americans with Disabilities Act Amendments Act (ADAAA):** The ADAAA broadens the scope of who is protected by the Americans with Disabilities Act (ADA). Among other things, the ADAAA provides that the determination of whether a condition substantially limits an individual's major life activities must be made without regard to the effects of mitigating measures. The ADAAA also expanded the scope of "regarded as disabled" claims and states that the term disability must be interpreted in favor of broad coverage to the maximum extent permitted under the law.
5. **Increased Employment Discrimination Lawsuits:** Workforce reductions resulting from the economic downturn in 2008 led to an increase in federal discrimination lawsuits as well as litigation under the federal Worker Adjustment and Retraining Notification (WARN) Act and similar state laws.

This increase in litigation is likely to continue as long as the economic crisis continues to require employers to reduce the size of their workforces.

6. **Increased Union Organizing Efforts:** Large labor unions are likely to continue efforts to increase membership and may continue to focus on specific industries. Additionally, labor leaders undoubtedly will continue to push for the passage of labor-friendly legislation.
7. **Expansion of Scope of Title VII Retaliation Claims:** On January 26, 2009, the U.S. Supreme Court expanded the scope of retaliation claims by holding that an employee who participates in an employer's internal investigation of a sexual harassment allegation, where no charge of discrimination has been filed, is protected by the opposition clause in Title VII's prohibition on retaliation. See Supreme Court Clarifies Scope of Title VII Retaliation Prohibition, in this issue of *Management Update*.
8. **Increased ERISA Litigation:** The U.S. Supreme Court's 2008 decision in Metropolitan *Life Insurance Co. v. Glenn* may make it easier for plaintiffs to challenge ERISA plan administrators' benefits determinations, which may lead to an increase in lawsuits challenging these determinations. Additionally, as the economy has weakened, losses to employee 401(k) plans have led to an increase in ERISA breach of fiduciary duty claims against 401(k) plan administrators. This is another trend that is likely to continue as long as the economy continues to struggle.
9. **Increased Immigration Regulation and Enforcement Efforts:** The Department of Homeland Security (DHS) likely will continue its increased efforts to crack down on the employment of unauthorized workers. As part of its effort to ensure that employers hire only authorized workers, the agency issued a "Safe Harbor" regulation addressing Social Security Administration no-match letters. A federal court enjoined implementation of this regulation in 2008; however, DHS has issued a Supplemental Final Rule addressing the court's concerns. If the court lifts the injunction, the safe harbor regulation may take effect in 2009.
10. **Compliance with the Mental Health Parity Act:** This Act amends ERISA and the Public Health Service Act by prohibiting group health plans (or health insurance coverage offered by such plans) from imposing more burdensome financial requirements for mental health or substance use disorder benefits than required for substantially all medical or surgical benefits covered by the plan.

Significant Legislative Items to Watch

1. **Paycheck Fairness Act:** This Act would amend the Equal Pay Act (EPA) to prohibit retaliation against employees for sharing salary information with co-workers, allow prevailing plaintiffs to recover compensatory and punitive damages in EPA cases, and facilitate the filing of class actions lawsuits under the EPA. It would also place the burden on employers to prove that any disparities in wages are not sex-based but are job-related and consistent with business necessity. The House combined this Act with the Lilly Ledbetter Fair Pay Act and sent it to the Senate; however, it was not included in the final version of that Act. The Paycheck Fairness Act currently is pending in the Senate as separate legislation.
2. **Employee Free Choice Act:** It is likely that labor leaders will attempt to cash in on their support of labor-friendly candidates and push for the enactment of this legislation, which was defeated in 2008. This legislation includes a card

check provision that would, for all intents and purposes, strip employees of the right to a secret ballot election and would require an arbitrator to set all terms (such as pay, benefits, holidays, etc.) of a first contract if the employer and union cannot agree on a first contract within 120 days. The legislation also provides for increased penalties for employers who are guilty of unfair labor practices; these penalties include treble damages and civil penalties up to $20,000. President Obama was a co-sponsor of the Senate version of this legislation in 2007. See the detailed discussion of the EFCA on our website at http://www.fordharrison.com.

3. **Family-Friendly Workplace Act:** This bill would amend the Fair Labor Standards Act (FLSA) to give private sector (that is, nongovernmental) employees the option of swapping paid time off for overtime pay. The bill would permit employees to be compensated at the rate of one and one-half hours of time off for each hour of overtime worked. Employees would have the option of requesting monetary compensation for overtime worked instead of time off. This legislation was introduced in the House of Representatives on February 10, 2009. An identical bill failed to pass Congress in 2008.
4. **Fair Pay Act of 2007:** This bill would amend the FLSA and, specifically, the Equal Pay Act to require equal pay for **equivalent** work (rather than equal pay for **equal** work, which is currently required). It would extend the Equal Pay Act's protections to prohibit distinctions based on race and national origin, as well as sex. The legislation defines "equivalent jobs" as jobs that "may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions." Essentially, this legislation would provide for a "comparable worth" pay system. President Obama was a co-sponsor of the Senate version of this legislation in 2007. The White House web site states that President Obama and Vice President Biden will "pass the Fair Pay Act to ensure that women receive equal work for equal pay." The White House web site can be accessed at http://www.whitehouse.gov/agenda.
5. **Civil Rights Act of 2008:** This legislation was introduced in 2008 as an omnibus bill designed to "restore, reaffirm, and reconcile legal rights and remedies under civil rights statutes." Among other provisions, this legislation would eliminate the caps on compensatory and punitive damages under Title VII and the Americans with Disabilities Act and would expand the anti-retaliation provisions of the FLSA. Additionally, it would make mandatory arbitration clauses in employee handbooks unenforceable. Portions of this legislation were introduced as parts of other bills, including the Equal Remedies Act of 2007 and the Arbitration Fairness Act of 2007.
6. **Family and Medical Leave Enhancement Act:** Introduced in the House of Representatives on February 3, 2009, the FMLA Enhancement Act (H.R. 824) would lower the threshold of companies subject to the FMLA from 50 or more employees to 25 or more employees. This legislation would also provide for unpaid leave (no more than 4 hours in a 30-day period or 24 hours in a 12-month period) for "parental involvement and family wellness leave." Under these provisions, an employee could take leave to attend or participate in their children's or grandchildren's school or extracurricular activities. Additionally, employees could take leave to take family members to doctor or dental appointments or to attend to the care needs of elderly individuals related to the employee. This leave would be in addition to the 12 weeks of leave permitted under the FMLA.

7. **RESPECT Act (Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers):** This legislation would amend the definition of "supervisor" under the National Labor Relations Act (NLRA) by eliminating the words "assign" and "responsibly to direct" from the list of supervisory duties. The legislation would also add the words, "and for a majority of the individual's worktime" before the list of supervisory duties. These amendments would make it much more difficult for an employer to demonstrate that an employee is a supervisor. The effect of this law would be that thousands of employees who currently are considered front line supervisors would fall within the definition of employees who are protected by the NLRA. President Obama was a co-sponsor of the Senate version of this legislation in 2007.
8. **Employment Nondiscrimination Act (ENDA):** This legislation would prohibit discrimination against any employee based upon actual or perceived sexual orientation. Several prior sessions of Congress have considered versions of this legislation and it is likely to be proposed again in 2009. On the White House web site, President Obama states that he believes the federal anti-discrimination employment laws should be expanded to include sexual orientation and gender identity.
9. **Forewarn Act of 2007:** This legislation would make significant modifications to the Worker Adjustment Retraining and Notification (WARN) Act to, among other things, lower the coverage threshold from employers with 100 or more employees to employers with 50 or more employees. It would also lower the number of employee layoffs that would trigger the notice requirements and increase the length of the notice that must be provided before a plant closing or mass layoff is ordered. Additionally, it would increase the penalty for failure to provide the required notice from "back pay" to "double the back pay." President Obama was a co-sponsor of the Senate version of this legislation in 2007.
10. **Working Families Flexibility Act:** This legislation would permit employees to request, once every 12 months, that their employers modify their work hours, schedule or location. President Obama co-sponsored the Senate version of this legislation in 2007.
11. **Healthy Families Act:** This Act would require employers with 15 or more employees to provide at least seven days of paid sick leave per year to employees who work more than 30 hours per week. President Obama has indicated that he supports this legislation. Additionally, the White House web site states that the Obama-Biden administration will initiate a 50-state strategy to encourage all of the states to adopt paid-leave systems.
12. **Patriot Employer Act:** This legislation would amend the Internal Revenue Code to provide tax benefits for "patriot employers" defined as employers who: remain neutral in union organizing campaigns; pay at least 60% of each employee's health care premiums; maintain or increase the number of full-time workers in the United States as compared to the number employed outside the United States; pay each employee a salary equal to at least the federal poverty level; and provide a pension plan. President Obama was a co-sponsor of the Senate version of this legislation in 2007.
13. **Arbitration Fairness Act of 2009:** Among other things, this legislation would make unenforceable any predispute arbitration agreement that requires arbitration of employment consumer or franchise disputes or disputes arising under civil rights statutes. It would not apply to arbitration provisions in a

collective bargaining agreement. This legislation was introduced in the House of Representatives on February 12, 2009 (H.R. 1020).

14. **Bill to Repeal a Limitation in the Labor-Management Relations Act Regarding Requirements for Labor Organization Membership as a Condition of Employment:** This legislation was introduced in the House in July 2008. Essentially, it would repeal a provision in the Labor-Management Relations Act that permits states to enact "right to work" laws.
15. **Private Sector Whistleblower Protection Streamlining Act of 2007:** This legislation would expand whistleblower protections for private sector employees and permit the recovery of compensatory and punitive damages.
16. **Safe Nursing and Patient Care Act of 2007:** This legislation would limit the number of mandatory overtime hours a nurse may be required to work for health care providers who receive Medicare payments. President Obama was a co-sponsor of the Senate version of this legislation in 2007.
17. **Illegal Immigration Enforcement and Social Security Protection Act of 2009:** This legislation (H.R. 98) was introduced in the House of Representatives on January 6, 2009, and would amend the Social Security Act to require Social Security cards to be made of plastic and include an encrypted machine-readable electronic identification strip as well as a recent digitized photograph. These strips would enable employers to access the Employment Eligibility Database to verify employment eligibility as required by the Immigration and Nationality Act (INA). The legislation also would amend the INA to require employers to verify that employees have Social Security cards as described above and to verify employment eligibility either by telephone or card reader verification system.

While it is not clear which, if any, of this legislation will be passed this year, it is clear that changes are on the horizon for employers. We will continue to keep you updated on important legislative developments.

President Signs Lilly Ledbetter Fair Pay Act

On January 29, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act. The Fair Pay Act, S. 181, alters the deadline or "statute of limitations" for pay discrimination claims brought under Title VII of the Civil Rights Act of 1964, the Age Discrimination Act of 1967, the Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. It also overrules the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*, 550 U.S. 618 (2007). Congress believed the Court, in *Ledbetter*, unduly restricted the time period for bringing pay discrimination claims. The new law will allow employees to bring claims that would have been too stale under the Court's ruling.

Under the new law, an unlawful employment practice occurs (1) when the discriminatory pay decision is made; (2) when "an individual" becomes subject to the discriminatory pay decision; or (3) when "an individual is affected by the discriminatory compensation decision or other practice." Thus, the deadline for filing a claim starts anew each time an employee receives wages, benefits, or other compensation tainted by the discriminatory pay decision, and may go back as far as two years from the date a charge was filed with the EEOC.

The law is retroactive to May 28, 2007, the date of the *Ledbetter* decision, which

means that it will apply to all claims of pay discrimination pending on or after that date.

Expansive Language

The law states that an unlawful employment practice occurs when "an individual" is affected by a discriminatory compensation decision or other practice. This language could be interpreted expansively to permit pay discrimination charges to be filed by individuals other than employees, so long as those individuals claim they have been affected by the discriminatory decision. The House rejected proposed amendments that would have clarified that the law applies only to employees.

Additionally, the new law is not limited to discriminatory wage or salary payments; it also applies to payments made under benefit plans, such as pension plans. Thus, employees long since retired, but who receive pension payments, may bring claims years after their pension plan went into effect.

Employers' Bottom Line

The expansion of the statute of limitations may require employers to reconsider the length of time they retain compensation and benefits records. Employers may also want to consider reviewing their compensation and benefits practices, under the direction of counsel, to ensure that these practices are implemented in a nondiscriminatory manner.

Supreme Court Clarifies Scope of Title VII Retaliation Prohibition

On January 26, 2009, the U.S. Supreme Court held that an employee who discloses information about discriminatory conduct in response to questions that are part of an employer's internal investigation is protected by the "opposition clause" of Title VII's prohibition on retaliation. See *Crawford v. Metropolitan Government of Nashville* (1/26/09). The Court reached this decision even though the employee did not instigate or initiate the complaint.

Title VII prohibits two types of retaliation. The "opposition clause" prohibits discrimination against an employee because he or she has opposed any practice made unlawful by Title VII. The "participation clause" prohibits discrimination against an employee because he or she has "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII.

In this case, Crawford was interviewed as part of the employer's internal investigation of another employee's sexual harassment allegation. There was no agency charge pending during or following the investigation. During the interview, Crawford described several instances of sexually harassing behavior to which she had been subjected. Subsequently, the employer discharged Crawford for, according to the employer, embezzlement.

Crawford sued, claiming her discharge violated both the opposition and participation clauses of Title VII's prohibition on retaliation. The Sixth Circuit affirmed the trial court's decision in favor of the employer, holding that Crawford could not meet the

requirements of the opposition clause because answering questions during the interview was not the type of "active, consistent 'opposing'" activity protected by the opposition clause.

The Supreme Court reversed this decision, holding that "nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."

In reaching this decision, the Court held that the term "oppose" carries its "ordinary meaning" - that is, to "resist or antagonize...; to contend against; to confront; resist; withstand." According to the Court, Crawford's statement during the interview, an "ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee" would qualify in the minds of reasonable jurors as resistant or antagonistic to the alleged harasser's treatment.

In his concurring opinion, Justice Alito emphasized his understanding that "the Court's holding does not and should not extend beyond employees who testify in internal investigations or engage in analogous purposive conduct." Specifically, Justice Alito stated, "it is questionable whether silent opposition is covered by the opposition clause."